United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7234-7235-7236

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United States Court of Appeals
For the Second Circuit

P/S

Docket No. 75-7234

SAMUEL J. LEFRAK, *et al.*,
Plaintiffs-Appellees,

—*against*—

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Defendants-Appellants.

Docket No. 75-7235

ROCHDALE VILLAGE, INC.,
Plaintiff-Appellee,

—*against*—

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Defendants-Appellants.

Docket No. 75-7236

NEW YORK CITY HOUSING AUTHORITY,
Plaintiff-Appellee,

—*against*—

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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September 12, 1975

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REPLY BRIEF OF DEFENDANTS-APPELLANTS

Plaintiffs' Answering Brief is bottomed on the proposition that lawyers are not responsible for the natural consequences of their actions when they deal with clients and prospective clients.

Plaintiffs' counsel argues that it is proper practice for a lawyer to send to an unknown person an in-blank contingent fee agreement on his law firm's letterhead and, further, that this act imposes no responsibility whatsoever on the firm for what is thereafter done with the in-blank form by the recipient.

Similarly, for a law firm to prepare a form letter calculated to show the desirability of employing particular lawyers to bring suit and to send it to several "clients" is defended as proper practice, which imposes no responsibility on the law firm even when thereafter the "clients" use the form letter almost verbatim to invite scores of other persons to employ the lawyers to bring such litigation.

In both cases the lawyers defend their conduct on the ground that the recipients' actions were not expressly authorized by them—not that the actions were unforeseen. Moreover, after the recipients' actions were brought to their attention, the lawyers maintain that they had no responsibility to act, were free to sit back and do nothing while "waiting for returns" (190a).

The specific question raised by this appeal is whether the District Court, when confronted with a motion to disqualify based on *prima facie* evidence of a campaign to solicit clients, properly discharged its responsibility by avoiding the hard question, accepting the superficial response and failing to pursue ambiguous and compromising circumstances which are nowhere satisfactorily explained.

Despite the unquestioned importance to the judicial system of the courts' supervision of members of the bar, plaintiffs contend that the District Court's action "should be given extremely limited review", that there is "no prescribed procedure to be followed" and that the District Judge is free to use "whatever procedure he deems ap-

propriate to the particular case'' (Answering Brief at 26, 28-29). In short, whatever the District Court may have done or failed to do in the course of an investigation on a motion to disqualify should be of no concern to this Court.

The Court of Appeals for the Tenth Circuit in a recent decision has rejected this *laissez-faire* position and has declared in firm language for the guidance of District Courts in that Circuit:

> In our view the verified motion to disqualify raises ethical questions that are conceivably of a serious nature. In such circumstances a written response should be required. The trial court should then hold *a full evidentiary hearing* on the issues posed by the motion to disqualify and the responses thereto, which hearing should include the taking of testimony. A motion of this type should not be resolved on the basis of mere colloquy between court and counsel. At the conclusion of such hearing the trial court should then make specific findings and conclusions, to the end that this Court will then have a record before it which will permit a *meaningful* review, should a review be sought. *Fullmer* v. *Harper,* 517 F.2d 20, 21-22 (10th Cir. 1975) (emphasis added)

Subsequently in reviewing and reversing the disposition of a motion to disqualify in another case, the Tenth Circuit reminded the Court below that the correct procedure had been carefully set forth in the *Fullmer case. Redd* v. *Shell Oil Co.,* 1975 Trade Cas. ¶ 60,382, n. 3 at 66,660 (10th Cir. June 18, 1975).

We submit that it is equally important for this Court of Appeals, and particularly appropriate in the instant

case, to set forth for the guidance of District Courts in this Circuit the procedure to be followed in matters of this nature and to reemphasize the importance to the administration of justice of a full and forthright airing of charges of unprofessional conduct.[1]

Affirmance of the decision below, predicated as it was on an inadequate investigation, an incomplete record and the ready acceptance of assertions of noninvolvement, would seriously compromise the effectiveness of the courts' supervision of the conduct of attorneys appearing before them and convert the Code of Professional Responsibilty into just another set of high-sounding principles that have no application in the real world.

This Reply Brief is addressed to:

a) the excursions outside the record in plaintiffs' Answering Brief;

b) the failure of the Answering Brief to cure the deficiencies in the record below by the device of making repeated unsupported assertions; and

c) the need to remand this case with instructions to complete the inquiry begun below and to utilize the tested means for the discovery of truth.

---

[1] The uncertainty of the Court below as to how it should proceed is evidenced by the fact that after hearing argument on March 3 the District Court advised counsel for defendant Exxon to set up the questions that he wished to ask and the witnesses he wished to depose (241a); counsel was granted two days to complete this preparation (241a-242a). The proceeding on March 3 concluded with the Court's statement, "I suggest you bring in your presentation," to which counsel responded that he would be ready to proceed (248a). However, when the hearing commenced on March 5, the Court announced:

> This will be a court hearing. I will ask the questions. I never intended anyone else to come in and ask questions. (260a-261a)

A.

Plaintiffs' Excursions Outside the Record Raise More Questions Than They Answer.

Consistent with the seriousness of the matter, the brief of plaintiffs-appellees restates the alleged facts in considerable detail, but with broad license. Significantly, it is constrained to go beyond any information solicited by the District Judge and attempts, by going outside the record, to justify the limitations placed by the Court upon its inquiry. Had the Court allowed an adequate record to be made, there would have been no occasion for any such excursion into matters outside the record upon this appeal.

1. The new "explanation" advanced for Mr. Wolfe's January 10, 1975 prediction of new plaintiffs is unsupported by the record.

The original papers in support of the motion to disqualify and to enjoin solicitation submitted by defendant Exxon to the District Court on February 21, 1975 quoted Mr. Wolfe's statement to the Court on January 10, 1975:

> We are going to have to have a substantial number of additional plaintiffs, some of whom fall into the same commercial relationship as Lefrak, others who may be cooperatives and the like. (108a)[2]

Neither in his affidavit of March 2, 1975 nor in his testimony on March 5, 1975 did Mr. Wolfe contend that his statements to the Court on January 10, 1975 were "totally

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[2] The Answering Brief (at 17, 19-21) makes much of the fact that in proofreading the Main Brief of Defendants-Appellants, the second "to have" in this quotation was erroneously treated as a typographical error and deleted. We regret this error, but it in no way affects the essence of Mr. Wolfe's prediction that for the first time "cooperatives" would be brought into the litigation as plaintiffs.

unrelated" (Answering Brief at 17) to the contemporary correspondence emanating from the Wien office concerning possible new litigants or that they related solely to "pending intervention petitions" which "posed a similar problem for plaintiffs as had the designation of Lefrak Organization, Inc. as plaintiff" (Answering Brief at 19).

Now for the first time appellate counsel for plaintiffs assert:

> The problem was that like Lefrak Organization, Inc., the named intervenor plaintiffs, Glenwood Management Corporation, Hillside Associates, Pickman Brokerage Agency and Forrest Hills South, Inc., arguably were not proper plaintiffs because they managed, but did not themselves own property or use and pay for heating oil. (Answering Brief at 19)

But this contention cannot withstand even casual scrutiny of the record. In the papers filed in the District Court on September 3, 1974 on behalf of these prospective plaintiffs, Mr. Wolfe personally represented facts in both the motions to intervene and in the proposed complaints (20a-50a) which are directly contrary to the representations now made to this Court. Mr. Wolfe stated as to Glenwood Management Corporation:

> Glenwood is the builder, owner and lessor of in excess of 5,000 apartment units in the Metropolitan New York and surrounding area. These properties provide housing for approximately 20,000 tenants. (21a; 23a)

He further stated:

> Glenwood has purchased petroleum products, including but not limited to, fuel oils and heating oils as well as electricity and steam heat. (22a; *see* 23a)

Similarly, as to Hillside Associates, Mr. Wolfe asserted:

> Hillside is the builder, owner and lessor of in excess of 2,000 apartment units in the Metropolitan New York and surrounding area. These properties provide housing for approximately 8,000 tenants. (29a; 31a)
>
> During the relevant time period, Hillside has purchased petroleum products, including, but not limited to, fuel oils and heating oils as well as electricity. 30a; *see* 31a)

Again, as to Pickman Brokerage Agency, Mr. Wolfe stated:

> Pickman is the builder, owner and lessor of in excess of 1,150 apartment units in the Metropolitan New York and surrounding area. These properties provide housing for approximately 4,500 tenants. (37a; 38a)
>
> * * *
>
> During the relevant time period, Pickman has purchased petroleum products, including but not limited to, fuel oils and heating oils as well as electricity. (43a; *see* 38a)

Finally, as to Forest Hills South, Inc., Mr. Wolfe said:

> Forest Hills is the builder, owner and lessor of in excess of 600 apartment units in the Metropolitan New York and surrounding area. These properties provide housing for approximately 2,500 tenants. (44a; 46a)
>
> During the relevant time period, Forest Hills has purchased petroleum products, including but not limited to, fuel oils and heating oils as well as electricity. (45a; *see* 46a)

There is not the slightest suggestion in any of the motions to intervene nor in the accompanying complaints, each signed personally by Mr. Wolfe (22a, 26a, 30a, 34a, 41a, 43a, 45a, 49a), that any of the potential intervenors were not apartment owners or that they were not seeking to assert claims as purchasers themselves of fuel oil. None of these potential intervenors were claimed by Mr. Wolfe to be mere managers of cooperative apartments who would have difficulty establishing their standing to sue under the antitrust laws.

Against this reality, it seems fair to conclude that Mr. Wolfe's reference on January 10, 1975 to potential plaintiff "cooperatives" had nothing whatever to do with the four motions to intervene filed in September 1974, but related to cooperative buildings which were to be contacted by Sulzberger-Rolfe and Elliman & Co. or to other potential plaintiffs as yet unknown.

Plaintiffs-appellees now gratuitously assert that "the Judge completely understood the context of Wolfe's statement" regarding "a substantial number of additional plaintiffs" (Answering Brief at 20-21). But neither the Court's opinion nor anything said to the Court below by plaintiffs' counsel suggests that the reference to "cooperatives" as potential plaintiffs was anything other than a reference to an entirely new group of plaintiffs, none of whom up to that time had ever sought to intervene in the litigation.[3]

---

[3] Plaintiffs' counsel contend that the District Court dismissed the motions to intervene without prejudice "as a result of the [January 10] conference" (Answering Brief at 21). In fact, the District Court's order was entered *pro forma* on a document which had been submitted by counsel for defendant Exxon in early December 1974 (56a). Thus, contrary to the assertion of plaintiffs' counsel, the entry of the order dismissing "Lefrak I" had nothing whatever to do with the District Court's interpretation of Mr. Wolfe's prediction regarding cooperatives.

In fact, there is no suggestion in the record that as of January 10, 1975 Mr. Wolfe and the Berger firm were not fully posted on the activities of the Wien firm. To the contrary, Mr. Felsten's progress report to Mr. Berger one month later (190a) reflects the close working relation between the two firms regarding the gathering of plaintiffs for the litigation.

2. Similarly, the new "explanation" advanced for Mr. Felsten's report to Mr. Berger on the Sulzberger-Rolfe circular letter and his other activities lacks support in the record.

The provocative statements in Mr. Felsten's letter to Mr. Berger (190a) were never explored by nor explained to the Court below. While Mr. Felsten volunteered no affidavit, his obvious early involvement in the litigation was apparent from the papers submitted in opposition to the motion to disqualify. Thus, upon the insistence of defense counsel, the District Court asked Mr. Felsten to testify on March 5. Nevertheless, the questioning was fatally inadequate (*see* Main Brief at 21-22; 38-40) and the Court ignored the letter in its opinion.

Plaintiffs now contend for the first time that:

> Felsten first learned of the Sulzberger letter when Sulzberger, a client of the Wien office, sent him a copy of the letter after it was sent out to Sulzberger's principals (190a, 299a, 302a). (Answering Brief at 12)

Despite the purported references to the record, nowhere does it appear that Mr. Sulzberger sent a copy of his letter to Mr. Felsten. Mr. Lippman testified that after he furnished the material to Mr. Sulzberger, which was incorporated into the Sulzberger-Rolfe circular letter, he received

a copy of the letter (278a-280a; *see also* 164a). The District Court never probed the circumstances under which Mr. Felsten obtained a copy, or the reasons he sent it to Mr. Berger (*see* 274a-275a; 322a-323a; 300a-302a; 330a-331a).

In a further excursion outside the record below, the brief for plaintiffs-appellees proffers a new "explanation" of Mr. Felsten's statement in his report to Mr. Berger that "We now are waiting for returns on this and at least two groups of other possible litigants" (190a).

We are told:

> More specifically, Felsten's reference was to the Helmsley real estate interests which manage and own a great deal of property in New York (299a-300a). (Answering Brief at 13)

Actually, in his testimony Mr. Felsten offered no specific identification of the "groups" from whom he was expecting "returns" or the "groups of other possible litigants" who might wish to join the litigation.

As noted in our Main Brief (at 38-40), the Court below in its questioning of Mr. Felsten touched very gingerly on the subject of the February 11 letter:

> Q. I will ask you the question to make sure you don't get into the well, so to speak.
>
> The next thing, as a result of a February 11th letter did anything occur or any action initiate by reason of that letter in someone being retained by you? A. No, my February 11 letter was a transmittal letter.
>
> Q. And that's all it was? A. Yes, sir.
>
> Q. And that was transmitted to whom? A. To Mr. Berger for his information. My foot was out the door as I wrote it. (302a)

There the Court was prepared to drop its questioning, but when counsel for defendant Exxon invited the Court's attention to the statement in the letter respecting "waiting for returns" and the expectation that results would be received by February 21 (190a), Mr. Felsten volunteered:

> A. I am speaking of clients of mine who expressed interest—clients of Bill's [Lippman's], who expressed interest—therefore mine—and those are the ones I referred to. (302a-303a)

Just who these "clients of Bill's" might be was never explained. On this appeal comes the idea that "specifically" it was Helmsley, whom Mr. Felsten himself described as *his* client of 20 years (299a). After noting that the Wien and Berger firms had been "co-counsel to the Helmsley interests in connection with the pending litigation" since October 10, 1974, plaintiffs' counsel now proceed to offer the further explanation:

> The need for continuing communications with respect to the Helmsley interests related to the interests which were owned in part by Harry B. Helmsley and with respect to which Helmsley needed his co-owner's consent to join the litigation. (Answering Brief at 13)

Similarly this contention is without support in the record and the only justification proffered is simply a footnote reference to the fact that a parallel suit was filed in the Eastern District by the Berger and Wien firms on March 31, 1975, entitled *Harry B. Helmsley, et al.* v. *Arabian American Oil Company, et al.*, No. 75-C-467 (M.A.C.).

B.

The Unsupported Assertions in the Answering Brief Cannot Cure the Deficiencies in the Record Below.

The Answering Brief flatly asserts that the District Court has already conducted a "full and complete judicial inquiry" which achieved a "full disclosure of the facts" (Answering Brief at 32). In truth, Judge Costantino's questioning of all four witnesses consumed no more than a total of thirty-one pages of transcript (271a-302a) —less than eight pages per witness. Given the number of critical documents in issue, the complex of communications and events offered in a dozen sworn affidavits, and the seriousness of the matters in question, this was on its face the antithesis of a full and complete inquiry.

That plaintiffs' counsel went outside the record to explain the Wolfe prediction and the Felsten report reflects the inadequacy of the investigation conducted by the Court below. The deficiency of the record is also evidenced by the fact that the following important questions were never even addressed:

— Why did Mr. Wolfe send out on firm letterhead an in-blank fee agreement that was obviously drafted for general use to a person he had never met but whom he understood to be involved in the real estate management business in New York?

— To whom else did the Berger firm send an in-blank fee agreement on firm letterhead?

— What information did Mr. Sulzberger obtain, and from whom did he obtain it, which led him to conclude in July 1974 that *Lefrak* was a class action?

— What information did Mr. Sulzberger have in January 1975 which led him to instruct Mr. Buchbinder to append to the Sulzberger-Rolfe circular

letter the in-blank fee agreement on the Berger firm letterhead?

— What transpired between January 10, 1975, the date of Mr. Lippman's letter to Mr. Sulzberger, and February 6, 1975, the date of the Sulzberger-Rolfe circular letter?

— If Mr. Sulzberger was solely concerned with advising his principals of "the need to consider commencing their own actions" and was not touting the Berger firm, as plaintiffs contend (Answering Brief at 11; 41-44), why does the Sulzberger-Rolfe circular say nothing about commencing "their own lawsuits" but instead assert (113a) that "only those who join the Lefrak Organization will be entitled to share in the recovery," that many cooperative boards have agreed to "contribute $1.00 per unit . . . in return for receiving a proportion of the award", and that Mr. Berger is a "highly qualified Philadelphia trial attorney who heads a firm which limits its practice to anti-trust and securities litigation"?

— Had "many Boards of Directors of co-operative buildings in New York" already agreed to contribute $1.00 per unit, as asserted in the Sulzberger-Rolfe circular (113a), and, if so, who knew this and provided the information to Mr. Buchbinder?

— With what other real estate interests did Mr. Lippman or Mr. Felsten communicate regarding the pending litigation?

— Why did Mr. Lippman fail to mention in his affidavit that he had sent his form letter on January 22, 1975 to Brown, Harris, Stevens, Inc.?

— What conversations were there between Mr. Lippman and Messrs. Karelsen regarding the further distribution of the Elliman & Co. circular?

Had the Court pursued a carefully prepared line of inquiry, such as that submitted by defense counsel (265a-267a; 319a-336a), answers to many of these mysteries might have started to emerge.[4] Instead, there remains a cloud of uncertainty.

Burdened with the present inadequate record, plaintiffs' counsel resort to conclusory assertions without citation. For example, acknowledging the importance of the Berger-Wien relationship to the investigation, they assert that it was "fully explored" by the Court below (Answering Brief at 33). Yet they fail to identify in the record any such exploration and, as we have noted, the Felsten February 11 report to Mr. Berger, which bears directly on this relationship, is nowhere adequately addressed. There was no satisfactory exploration of the links between the two firms or the text of the Lippman letter which was supposedly drafted and signed by an attorney in the Wien firm unfamiliar (163a) with the litigation.[5]

No amount of dogmatic assertions can hide the deficiency of this record.

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[4] The unasked questions proposed by defense counsel to expose the true facts are dismissed as improper and as an invasion of "litigation strategy", "conversations between attorney and client" and "conversations between associate counsel" (Answering Brief at 23; 34-35).

We fully recognize the unquestioned right of clients to receive advice in confidence from their counsel, but this is not a license to counsel to avoid accountability for communications and their consequences which may offend the strictures of the Code of Professional Responsibility.

[5] It will be recalled that the form letter contained, among other matters, details as to fee arrangements, the role of the Wien firm as "associate counsel", the nature of the Berger firm's practice, and the opinion of plaintiffs' counsel regarding the prospects for settlement (*see* Main Brief at 34-35).

C.

The Proceedings on Remand Should Employ the Tested Means for the Discovery of Truth.

The deficiencies of this record are the direct result of the approach adopted by the Court below. The Answering Brief seeks to defend that approach—the exclusion of counsel for defendants, the narrowed scope of inquiry and the rejection of traditional methods of discovery—on the grounds that a proceeding on a motion for disqualification falls under the rubric "judicial inquiry".[6] It is urged that the District Court was free to proceed as it chose.

This Court should not permit the search for truth—the object of any inquiry in the federal courts—to be obscured by resort to a superficial label. The fact remains that more questions are raised than answered by the present record, and the cases cited in the Answering Brief simply do not support the propositions urged.

The cases most prominently displayed by plaintiffs' counsel are *Erdmann* v. *Stevens*, 458 F.2d 1205 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972) and *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908). *Erdmann* is cited for the proposition that disciplinary proceedings are "judicial" inquiries and *Prentis* is relied upon to define such an inquiry as one in which the court "investigates, declares and enforces the liabilities" (Answering Brief at 27, n. 29). *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) is cited for the proposition that the court "examines" the disqualification charge.

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[6] At the outset of the March 5 hearing, the District Court ruled that the inquiry was "strictly a judicial proceeding" rather than "an adversary" one (264a).

These cases provide no insight regarding the content, procedural or otherwise, of so-called "judicial" proceedings nor do they provide any relevant standard for judging the propriety of the actions of the District Court in this case.

In *Erdmann,* a supervising Legal Aid attorney brought an action under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, against the Justices of the Appellate Division, First Department of the New York State Supreme Court seeking declaratory relief and an injunction prohibiting disciplinary proceedings which had been instituted by them. The proceeding was based on comments Erdmann had made in a magazine article, and he asserted that the specific purpose of the proceeding was to prevent the exercise of his First Amendment Rights.

Faced with the rule that a federal court should not enjoin a pending criminal prosecution in state courts except in extraordinary circumstances, *see Younger* v. *Harris,* 401 U.S. 37 (1971), Erdmann argued that the disciplinary proceeding was "administrative rather than judicial in nature." This Court disagreed, holding at 458 F.2d at 1208:

> Although a state court may perform nonjudicial functions . . . its conduct of disciplinary proceedings with respect to those admitted to practice before it amounts to a judicial inquiry.

It added that the "power to discipline . . . rests exclusively with the court." *Id.* at 1209.[7] The Court went on to hold that since disciplinary proceedings are "comparable to a criminal rather than to a civil proceeding", *id.* at 1209, the rule of *Younger* was to be applied with full force and effect.

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[7] The supposed quotation from *Erdmann* appearing at 27 of the Answering Brief does not accurately track the language of this Court. *See* 458 F.2d at 1208-09.

To cite *Erdmann* for the proposition that a motion to disqualify, as a "judicial inquiry", is in some way removed from the adversary process and the customary methods for establishing the truth, totally ignores the purport of this Court's determination.

Prentis, concerned with the difference between legislative and judicial proceedings, is equally void of support for plaintiffs' contention. There certain railroads brought suit in federal court for an injunction against the Virginia Corporation Commission, which had legislative power to set passenger rates and judicial power to enforce them, asserting that the rates set were confiscatory and deprived them of property without due process of law. The Commission argued that it was essentially a court and that therefore the action should be dismissed on the ground that federal law prohibited actions to enjoin state court proceedings (Rev. Stats. § 720). Justice Holmes rejected this argument, saying at 211 U.S. at 226:

> But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

The Court went on to hold that while the suit was not barred by § 720, the Virginia statute establishing the Com-

mission provided for court challenge to the Commission's rulings and that the railroads' constitutional claims should be pursued down that avenue prior to resort to the federal courts. *Id.* at 230.

The *Erdmann* and *Prentis* cases, principally relied upon by plaintiffs, merely contrast judicial to administrative or legislative functions. That *Erdman* dealt with disciplinary proceedings, which were analogized to criminal proceedings, serves only to reinforce the necessity for utilizing the adversary process and the customary judicial methods for the ascertainment of truth in such matters.[8]

Nor does the comment of the Court of Appeals for the Third Circuit in *Richardson* v. *Hamilton, supra,* lend support to plaintiffs' counsels' contentions (Answering Brief at 27, n. 30). Of course the District Court is obliged to "examine" the charge of misconduct, for it is the District Court which is empowered to supervise the conduct of attorneys appearing before it. The word "examine", however, was not clothed magically with specific procedural meaning as plaintiffs' counsel suggests.

Finally, the cases cited in the Answering Brief at 29 indicate the various procedural mechanisms which have been usefully employed in fact-finding on disqualification motions. In each of these cases the facts were developed by a means suited to the issues to be determined. Since the necessary facts were fully developed and explored, there was no occasion for the Court of Appeals to question the District Court's choice of procedure.

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[8] As we pointed out in our Main Brief disciplinary proceedings in at least three of the judicial departments in New York and in the Association of the Bar of the City of New York are adversarial in nature. A special ABA committee to investigate disciplinary procedures has found the subpoena power to be critical to effective proceedings. *See* Main Brief at 41-42, n. 18.

In the instant case it is the absence of a full development and exploration of the facts that requires the District Court's ruling to be overturned. As a result of the District Court's uncertainty in dealing with the motion for disqualification, it conducted what it described as a "judicial" proceeding without the benefit of discovery, and with no cross-examination—"the 'greatest legal engine ever invented for the discovery of truth' ", *California* v. *Green*, 399 U.S. 149, 158 (1970).

Consequently, many significant factual questions remain open and unexplored. This state of the record is extraordinary, particularly in view of the fact that counsel chose to sit tight and let the distribution of the circular letters run its course, even after they knew, first, that their names and their in-blank retainer forms were being used in an extensive distribution program recommending that they be employed to bring lawsuits and, second, that the recommendation was at a level of huckstering that invited recipients to complete an enclosed form and forward $1 per apartment to share in the prospect of a recovery or settlement forecast by counsel.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our Main Brief, the order of the District Court should be vacated and the proceeding remanded for a full and vigorous investigation of the underlying facts.

Respectfully submitted,

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September 12, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

SAMUEL J. LEFRAK, et al.,

Plaintiffs-Appellees,

-against-

ARABIAN AMERICAN OIL COMPANY, et al., and two other cases,

Defendants-Appellants.

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn deposes and says that he is over the age of twenty one years; that on the 12th day of September, 1975 he served the within Brief upon Richard A. Sprague, attorney for Plaintiffs-Appellees, by depositing two true copies of the same securely enclosed in a postpaid wrapper in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said attorney at David Berger, P.A., 1622 Locust Street, Philadelphia, Pennsylvania 19103, that being the address within the state designed by them for that purpose upon the preceding papers in this action.

George A. Scholze

Sworn to before me this
12th day of September, 1975

Notary Public

ALAN THNE
Notary Public, State of New York
Residing in Kings County
Kings Co. Clk's No. 24-7031350
Certificate Filed in
New York Co. Clk's
Commission Expires March 30, 1976

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& Waskel 9-12-75